Supreme Court, U.S.
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No. 97-282

In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT THE CITY OF BOCA RATON IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, under common-law agency principles and this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that respondent City of Boca Raton was not liable under Title VII for the "hostile work environment" form of sexual harassment engaged in by two of the City's lifeguard supervisors.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were plaintiff-appellant and cross-appellee Nancy Ewanchew and defendant-appellees Bill Terry and David Silverman.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Underlying Facts	2
B. Proceedings in the District Court	5
C. The Decision of the Court of Appeals Panel	7
D. The Decision of the En Banc Court of Appeals	8
ARGUMENT	10
I. REVIEW IS NOT NEEDED TO RESOLVE ANY CONFLICT AMONG THE COURTS OF APPEALS	13
II. REVIEW IS NOT NEEDED TO ESTABLISH ANY NEW PER SE RULES	16
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997)	11
Gary v. Long, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995)	11, 14, 20
Hamilton v. Rogers, 791 F.2d 439 (5th Cir. 1986)	7
Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-232)	10, 14, 15, 16
Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)	11
Karibian v. Columbia University, 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994)	10, 11, 13
Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992)	14, 20
Landgraf v. USI Film Prods., 511 U.S. 244 (1994)	6
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)	10, 11, 16
Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997), *petition for cert. filed*, No. 97-578 (Oct. 1, 1997)	10, 13, 16, 20
Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989)	7

STATUTES	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)	*passim*
Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071	6
42 U.S.C. § 1983	5

MISCELLANEOUS	
29 C.F.R. § 1604.11(f)	19
Restatement (Second) of Agency § 219	9
Restatement (Second) of Agency § 219(2)(d)	16
Restatement (Second) of Agency § 275 cmt. a	21
Restatement (Second) of Agency § 275 cmt. c	21

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-40a) is reported at 111 F.3d 1530. The order vacating the panel opinion is reported at 83 F.3d 1346. The panel opinion (Pet. App. 41a-68a) is reported at 76 F.3d 1155. The opinion of the district court (Pet. App. 69a-104a) is reported at 864 F. Supp. 1552.

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 255, which provides:

> It shall be an unlawful employment practice for an employer—
>
> > to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994 ed.).

STATEMENT OF THE CASE

A. Underlying Facts

Petitioner has adopted the statement of facts set forth by the en banc court of appeals. Pet. 3-6. The following facts are undisputed:

Petitioner Beth Ann Faragher worked as an ocean lifeguard for the City of Boca Raton, Florida. The City employed Faragher intermittently from September 1985 until June 1990. Faragher worked for the City mostly on a part-time and summer basis while attending college. In 1988, after her graduation, she quit a full-time position in retail sales so that she could work full time on the beach. She resigned her lifeguard position in June 1990 to attend law school. Pet. App. 70a, 72a-73a.

The City's ocean lifeguards were part of the Marine Safety Section of the City's Parks and Recreation Department. Within the Marine Safety Section's chain of command, lifeguards reported to Marine Safety lieutenants, and above them to Marine Safety captains. The captains in turn reported directly to the Chief of the Marine Safety Section. The Chief of the Section was directly supervised by the Recreation Superintendent, and the Recreation Superintendent reported to the Director of Parks and Recreation. The Director of Parks and Recreation reported to the City Manager. Pet. App. 17a.

During the time that Faragher worked as a lifeguard, respondent Bill Terry served as Chief of the Marine Safety Section. Respondent David Silverman served first as a Marine Safety Lieutenant and then as a Captain. As Chief of the Section, Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards subject to approval by higher management. Pet. App. 92a. As Lieutenant and later as Captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines. *Id.*

The City's lifeguards had little contact with City officials. "Marine Safety Headquarters was at the beach—in a remote location, far away from City Hall." Pet. 4. Indeed, "the lifeguards' contacts with higher city officials, such as the Recreation Superintendent, were almost nonexistent." Pet. App. 93a. The district court explicitly found that neither Terry nor Silverman "had the standing necessary to qualify as higher management for the City." Pet. App. 71a. Petitioner does not challenge this finding.

During the course of Faragher's five years of intermittent employment as a lifeguard, Marine Safety Chief Terry subjected Faragher to uninvited and offensive touching, and Lieutenant Silverman made offensive comments and gestures to Faragher. In particular, Terry touched Faragher's shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the buttocks. Pet. 5.

Faragher never complained to Parks and Recreation Department management about Terry's and Silverman's conduct while she was employed with the City or when she resigned. Pet. 5. Faragher did not discourage her sister from applying for a job as a Boca Raton ocean

lifeguard, and she did not discuss sexual harassment with her friend Kelly Evans, who was another female lifeguard in the City's employ. Pet. App. 78a, 90a. Faragher did speak about Terry's and Silverman's conduct with former Marine Safety Lieutenant and later Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate-to-superior basis; they spoke with him as a friend whom they held in high regard. Gordon did not report the complaints to his supervisor Terry or to any other City official. Pet. 5. The district court found that, like Terry and Silverman, Gordon did not have the standing necessary to qualify as higher management for the City. Pet. App. 71a. The court therefore did not impute to the City Gordon's actual knowledge of the complaints by Faragher and other lifeguards about Terry and Silverman. Pet. App. 84a.

Another lifeguard, Nancy Ewanchew, was also subjected to uninvited and offensive touching by Terry, and offensive comments and gestures by Silverman. There were two specific incidents in which Terry touched Ewanchew in a sexually offensive manner. Ewanchew, like Faragher, did not complain to the Parks and Recreation Department management about Terry's and Silverman's conduct while she was employed with the City or when she resigned. Ewanchew resigned her position with the City in April 1989, saying that she was leaving because she had found a better job. Pet. 4-6.

In April 1990, Ewanchew wrote a letter to the City's Director of Personnel, Richard Bender, complaining that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know about Terry's and Silverman's conduct until Bender received Ewanchew's letter. Pet. 5-6. The City then investigated Ewanchew's complaint and determined that Terry and Silverman had engaged in inappropriate conduct. The City reprimanded and disciplined both Terry and Silverman in June 1990.

In particular, Terry forfeited 160 hours of annual leave, and Silverman forfeited 40 hours of annual leave. Pet. App. 80a.

Faragher declined to come forward with any complaint in the fall of 1989, even though she knew she would be attending law school the following year. She also declined to complain in April 1990, after Ewanchew wrote to Bender, even though Ewanchew urged her to do so. Faragher reviewed the City's revised sexual harassment policy in May 1990, but she made no complaint at that time, even though the policy urged her to do so. R7-208 at 40-42.[1]

B. Proceedings in the District Court

A year and a half later, on January 6, 1992, Faragher and Ewanchew filed suit against the City of Boca Raton, Terry, and Silverman. After a non-jury trial, Terry and Silverman were found liable to Faragher under 42 U.S.C. § 1983, and Terry was found liable to Faragher on her claim of battery. Faragher was awarded $10,000 in compensatory damages against Terry and Silverman, jointly and severally, and she was awarded $500 in punitive damages against Terry. Terry was also found liable to Ewanchew on her battery claim. Ewanchew was awarded $35,000 in compensatory damages and $2,000 in punitive damages against Terry. Notwithstanding the ruling on Ewanchew's battery claim, the district court found that Ewanchew did not perceive her work environment as abusive and that she therefore failed to establish her § 1983 claim for sexual harassment. Pet. App. 100a-101a.

The district court also found the City liable to Faragher under Title VII.[2] The court awarded Faragher $1 in

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[1] R7-208 refers to Volume 7, Document 208, in the record in the court of appeals (Faragher's testimony).

[2] Faragher had originally brought a Title VII claim against Terry and Silverman individually, and she sought joint and several compensatory damages, as well as declaratory and injunctive relief

nominal damages against the City. By separate order dated March 28, 1995, the district court held the City, Terry, and Silverman jointly and severally liable for Faragher's attorneys' fees.

The court ruled that Terry's and Silverman's conduct was sufficiently severe or pervasive to create a hostile working environment. Pet. App. 89a-90a. Although the court found that the City had no actual knowledge of Terry's and Silverman's sexual harassment, the court nevertheless held the City liable under Title VII on two alternative theories.

First, the district court ruled that Terry's and Silverman's behavior was not only sufficiently pervasive to create a hostile work environment but that the same finding of "pervasiveness" was also sufficient to support "an inference of knowledge, or constructive knowledge" on the part of the City. Pet. App. 92a.

Second, the court held that, taking into consideration the "overall workplace structure," as well as the supervisory authority of Terry, Silverman, and Gordon, all three men were acting as "agents of the City," Terry and Silverman by engaging in their harassing conduct and Gordon by failing to report the complaints brought to him. Pet. App. 93a. On this basis, the court held that the City was liable under Title VII even in the absence of any actual or constructive notice to the City of the harassing conduct. The court did not find that Terry's and Silverman's supervisory authority over Faragher contributed to or facilitated the harassment. *Id.*

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against all three defendants. By pre-trial order dated August 13, 1992, the court struck the claim for compensatory damages against the City (because all of the events at issue occurred before enactment of the Civil Rights Act of 1991, *see Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)), struck the request for declaratory and injunctive relief, and dismissed the claim against Terry and Silverman individually.

C. The Decision of the Court of Appeals Panel

Faragher and Ewanchew appealed, and the City cross-appealed.[3] A panel of the court of appeals reversed the district court's ruling against the City on the Title VII claim and otherwise affirmed. The panel concluded that, although Terry and Silverman had created a hostile work environment for Faragher, none of the district court's alternative theories for holding the City liable under Title VII was meritorious.

Addressing first that portion of the district court's decision that focused on Terry's and Silverman's supervisory authority and the structure of the Marine Safety Section workplace, the panel observed that petitioner did not contend, and that the record in any event would not support a contention, that Terry and Silverman acted within the scope of their employment when they harassed Faragher. Pet. App. 59a, 63a. Nor was there evidence that Terry's and Silverman's exercise of their supervisory authority somehow aided or facilitated their harassment of Faragher. Pet. App. 63a-64a & n.14. Contrasting the facts of this case with those at issue in *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989), and *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986), the panel ruled that Terry and Silverman did not invoke their authority over petitioner when they engaged in their harassment and that therefore the district court erred in relying on the structure of the Marine Safety Section workplace as a basis for Title VII liability. Pet. App. 61a-63a.

The panel similarly rejected that portion of the district court's decision that based Title VII liability on Gordon's failure to report Terry's and Silverman's sexual harassment. Noting the district court's finding that Gordon did not rank as higher management, and that notice to him could not be imputed to the City, the panel held that

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[3] Faragher and Ewanchew appealed the district court's ruling that the City was not liable on plaintiffs' claim alleging negligence in the City's retention and supervision of Terry.

Title VII liability also could not be predicated on Gordon's failure to report the complaints from Faragher or other lifeguards. Pet. App. 66a & n.16. As the district court found, Gordon did not receive this information as an agent of the City but rather as a friend whom the lifeguards regarded highly. Pet. App. 82a.

Finally, the panel rejected the district court's ruling that the pervasiveness of Terry's and Silverman's harassing behavior was in and of itself sufficient to give the City constructive notice of their wrongful conduct. Although the panel was prepared to assume that "[t]here may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it," the court held that "this is not such a case." Pet. App. 67a. The court observed that the district court had expressly found not only that the City had no actual knowledge of Terry's and Silverman's conduct but also that there was a complete absence in the record of any factual basis to conclude that the City should have known of Terry's and Silverman's conduct. *Id.*

D. The Decision of the En Banc Court of Appeals

In response to Faragher's petition for rehearing, the court of appeals vacated the panel decision and heard the case en banc. The only issues discussed by the en banc court concerned the question of the City's liability under Title VII. In all other respects, the en banc court affirmed the decision of the district court. Pet. App. 5a n.3.

The en banc court declared that it would address the following two issues:

(1) whether the City may be liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; and

(2) whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of Faragher.

Pet. App. 5a. On both issues, the en banc court concluded, like the panel, that the City was not liable.

The principal difference between the en banc decision and the panel decision was that the en banc court switched the way in which the labels "direct" and 'indirect" were used to refer to the different theories of the City's liability. Following the Restatement (Second) of Agency § 219, the en banc court used the term "direct" to refer to liability based on the theory that the City knew or should have known about Terry's and Silverman's wrongdoing, and failed to take appropriate corrective action. The court used the term "indirect" to refer to liability based on the theory that the harassment occurred within the scope of the supervisor's employment or that the supervisor's agency relationship with the City somehow aided or facilitated the supervisor's harassment of his subordinate. Pet. App. 7a-8a & n.4.

The en banc court turned first to the question whether the City could be held directly liable for Terry's and Silverman's harassing behavior. The court stated that "[t]his case presents the archetypical example of employees stepping outside the scope of their employment and seeking to further personal ends." Pet. App. 12a. It further observed that "[n]o person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures" and that "Terry and Silverman were not aided in accomplishing the harassment by the existence of any agency relationship with the City." Pet. App. 13a-14a. The court also stressed that "there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures." Pet. App. 13a. For all these reasons, the court held that the City could not be held liable on an indirect liability theory. Like the panel, the en banc court refused to impute sexual harassment liability to an employer merely because the harasser possessed supervisory or disciplinary authority over the person who was being harassed.

On the issue of direct liability, the en banc court ruled that "the district court clearly erred in finding that the City's knowledge may be inferred from the fact that the conduct was pervasive enough to create an abusive work environment." Pet. App. 17a. Although the en banc court said that there may be cases in which harassing conduct becomes so pervasive that the employer should have known about it, it held that this case does not fall in that category. Pet. App. 16a-17a. The court commented that neither Faragher nor the district court identified any factual basis for concluding that the City should have known about the misconduct. The court also held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, since Gordon did not occupy a higher management position, and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards. Pet. App. 15a & n.9.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted. Petitioner's assertions concerning a conflict among the circuits are misguided. There is no indication that any other court of appeals would have reached a different result on the facts of this case. All of the courts of appeals that have addressed hostile work environment claims since this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)—including all of the decisions on which petitioner relies—have, in accordance with this Court's ruling, applied common-law agency principles in determining when and under what circumstances an employer should be liable for an employee's harassing conduct. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 633-34 & n.10 (2d Cir. 1997), *petition for cert. filed*, No. 97-578 (Oct. 1, 1997), *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443-44 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-232); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368-69 (8th Cir. 1997); *Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

It is worth emphasizing that this Court in *Meritor* explicitly held that the court of appeals in that case "*erred* in concluding that employers are always automatically liable for sexual harassment by their supervisors." 477 U.S. at 72 (emphasis added). In the years since *Meritor*, the courts of appeals doubtless have employed somewhat different verbal formulations in identifying which employers are, and which employers are not, liable for "hostile work environment" harassment by supervisory employers. But that is a far cry from saying that the courts of appeals have actually reached different results in comparable cases, much less in cases like the one presented here. Given the fact-intensive nature of claims of discrimination based on a hostile work environment, it is essential to review and compare the facts of particular cases to determine whether there is any actual disagreement among the circuits. Such a comparison is conspicuously lacking in the petition.

Moreover, the very cases on which petitioner relies to establish the alleged conflict describe the governing legal standards in terms very similar to those employed by the court of appeals here. *Compare, e.g., Karibian*, 14 F.3d at 780, with the decision below, Pet. App. 8a, 10a. The court of appeals' decision proceeds directly from common-law agency principles, as prescribed by this Court in *Meritor*, and does not conflict with the outcome reached by any other court of appeals in a comparable case. There is no need for further review.

Nor is review justified by petitioners' invitation that the Court address and resolve one or more of three purported questions of first impression.

With respect to the first of these questions—whether in appropriate circumstances the sheer pervasiveness of a

hostile work environment can give rise to an inference that the employer knew or should have known about the offending conduct—the court of appeals already has acknowledged that there may be cases "in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice." Pet. App. 16a n.10. Petitioner's complaint therefore is not with the court's statement of any operative legal principle but rather with the court's conclusion that on the facts of this case the mere existence of a hostile work environment did not give rise to constructive knowledge on the part of the City.

As far as the second and third questions are concerned, petitioner essentially seeks to create one or more per se rules to replace the well-established principle that issues of agency properly depend on an examination of all of the facts and circumstances involved. In particular, petitioner would have this Court establish a per se rule that an employer's failure effectively to disseminate a sexual harassment policy means that the employer will be deemed to have constructive knowledge of whatever harassment may occur, regardless of the facts or circumstances involved. Alternatively or in addition, petitioner argues for a per se rule that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy, what his duties and responsibilities are, and what, if any, relationship he may have to the alleged harassment.

Neither of these proposed per se rules is consistent with the common-law agency principles that this Court said in *Meritor* should be applied to determine when an employee should be held liable under Title VII for harassing conduct by its employees. Nor has any other court seen fit to adopt or apply any such per se rules. The mere preference of petitioner for such an approach provides no proper basis for review in this Court.

I. REVIEW IS NOT NEEDED TO RESOLVE ANY CONFLICT AMONG THE COURTS OF APPEALS.

In reaching its decision that the City should not be held liable under Title VII for Terry's and Silverman's behavior, the en banc court ruled that "Terry and Silverman were not acting within the line and scope of their employment in perpetrating their harassment against Faragher" and they "were not aided in accomplishing the harassment by the existence of any agency relationship with the City". Pet. App. 14a. This case therefore is readily reconcilable with *Karibian*, *Torres*, *Harrison*, and *Hicks*, the cases on which petitioner relies to demonstrate an alleged conflict with the decision here. Indeed, in *Torres*, one of the cases that supposedly conflicts with the decision below, the Second Circuit affirmed a grant of summary judgment in favor of the employer on grounds very similar to those applied here. 116 F.3d at 635 (plaintiff failed to allege facts showing a "nexus" between the supervisory authority and the harassment). And in *Karibian*, the earlier Second Circuit decision that petitioner also claims is inconsistent with the decision below, the court of appeals explicitly stated its holding in terms very similar to those used here:

> We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. [citations omitted]. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

14 F.3d at 780, *quoting Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

To the extent that the cases do reveal any divergence among the circuits, it is only within the category of cases that does *not* include this case, namely, cases in which plaintiff is able to show that the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *Gary v. Long* in the D.C. Circuit was one such case. There, the harassing supervisor plainly was alleged to have used his authority over the employee as part of his harassing behavior. As the court of appeals summarized the allegations,

> Long [the supervisor] first attempted to entice Gary [the employee] into having sexual relations with him through promises that he could make her job easier. After this carrot proved unsuccessful, Long tried using a stick. He repeatedly threatened Gary with adverse employment consequences, including termination of employment, if she did not submit to his advances.

59 F.3d at 1393-94. The *Gary* court observed, however, that the employer had "an active policy against sexual harassment, . . . and that there is no claim that these procedures were not known by the employees." *Id.* at 1398. The court held that "an employer may not be held liable for a supervisor's hostile work environment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences." *Id.*

Petitioner relies on language from the Tenth Circuit in *Harrison*, 112 F.3d at 1446, for her assertion that there is tension between *Gary* and *Karibian*. *Harrison*, however,

is like *Karibian* and *Gary*, and unlike this case, in that the supervisor repeatedly used his authority to accomplish his harassment. *See Harrison*, 112 F.3d at 1440-41 (supervisor numerous times altered employee's work assignments and ordered her to accompany him to remote areas of work site where supervisor physically and verbally sexually harassed employee). The district court in *Harrison* entered judgment on the basis of a jury verdict in favor of the employer, and the court of appeals reversed and remanded for further proceedings. The court held that the district court's instructions to the jury erroneously suggested that the employer could be liable only if the jury found that the supervisor "had authority, apparent or otherwise, to harass plaintiff." *Id.* at 1449. The court also ruled that the instructions erroneously defined the term "apparent authority" and improperly omitted any mention of the possibility that the employer could be liable if the supervisor was aided in his harassment by the existence of the agency relation. *Id.* at 1450-51.

In the course of its general review of the governing law prior to announcing the actual basis for its decision, the *Harrison* court in dictum endorsed the Second Circuit's approach in *Karibian*, explaining that *Karibian* "allows an employer to be held liable, *even if a sexual harassment policy is in place and is made known to the plaintiff*, where the supervisor uses his actual or apparent authority to aid or facilitate his perpetration of the harassment." 112 F.3d at 1446 (emphasis added). To the extent, therefore, that there is any tension between *Karibian* and *Harrison*, on the one hand, and *Gary*, on the other, it concerns the question whether an employer's effective and well-publicized sexual harassment policy can protect an employer from liability when a supervisor does use his actual or apparent authority to facilitate his harassment. Here, the harassment involved no such use of the supervisors' actual or apparent authority.

The court of appeals in this case relied on *Gary* for the proposition that the term "aided" in Restatement § 219 (2)(d) should be interpreted narrowly and that it contemplates employer liability only where "the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a; Pet. App. 64a, n.14. This portion of *Gary* was expressly followed by the Second Circuit in *Torres*, 116 F.3d at 635, and there are no facts in this case to suggest that Terry or Silverman used or relied on their supervisory authority as part of their harassment. The court of appeals' reliance on *Gary* for the proper interpretation of the word "aided" in the second clause of § 219(2)(d) is entirely consistent with this Court's ruling in *Meritor*, 477 U.S. at 72, that employers are not to be held automatically liable under Title VII for sexually harassing conduct by their supervisory employees. Indeed, *Harrison* itself recognized that where the harasser does not in some way utilize his supervisory authority to further his harassing behavior, employer liability cannot be predicated on the second clause of § 219(2)(d): "We emphasize, however, that this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff." 112 F.3d at 1446. Accordingly, there is no disagreement among the courts of appeals on any point that has bearing on this case.

II. REVIEW IS NOT NEEDED TO ESTABLISH ANY NEW PER SE RULES.

Petitioner contends that review is needed to establish one or more of three possible per se grounds on which an employer allegedly should be held to have received constructive notice of unlawful harassment. Petitioner's real complaint, however, is that the en banc court applied well-established law to the facts of this case in a manner that did not favor petitioner. That is not an adequate basis for review in this Court or for the creation of new per se rules.

Firt, petitioner takes issue with the en banc court's holding that in this case Terry's and Silverman's sexual harassment was pervasive enough to constitute a hostile work environment, but not pervasive enough to charge the City with constructive knowledge of that harassment. The en banc court acknowledged that "[a] plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge." Pet. App. 15a. The court ruled, however, that here the harassment was not so pervasive that the City should be charged with such knowledge:

> There may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it. But this is not such a case. . . . The district court did not find, nor has Faragher pointed to, any factual basis for concluding that the City should have known of their conduct. The evidence suggests that just the opposite is true.

Pet. App. 16a. *See also* Pet. App. 67a (panel opinion). The en banc court articulated the basis for its ruling as follows:

> The lifeguards were stationed at a remote location and had little contact with City officials. The harassment itself occurred intermittently over a long period of time. Faragher worked for the City mostly on a part-time and summer basis, and the district court's holding was premised upon a few, discrete instances of harassment. Another lifeguard, Kelly Evans, was a friend of Faragher's, yet the two never discussed sexual harassment and there is no evidence that Ms. Evans was otherwise aware of Terry's and Silverman's harassing behavior toward Faragher. And, as part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions but never mentioned anything about sexual

> harassment or offensive words or touching by Terry or Silverman; nor is there any evidence that Dioli-Kumm was otherwise aware of such harassment.

Pet. App. 16a-17a. The court's decision on this point thus stands only for the unremarkable proposition that under the facts presented here, the harassment was not sufficiently pervasive that the City should be charged with constructive knowledge of it. That case-specific decision does not warrant further review.

Quoting from the dissent of Judge Barkett, petitioner accuses the court of "collaps[ing] the two distinct inquiries of actual knowledge and constructive knowledge into one, [effectively] requiring actual knowledge before imposing liability." Pet. 24, *quoting* Pet. App. 22a. That accusation is not justified. All of the en banc court's factual observations relate to whether the City *should have known* about the sexual harassment of petitioner. In discussing the fact that despite numerous conversations petitioner never brought Terry's and Silverman's sexual harassment to the attention of her friend Kelly Evans, who was also a female lifeguard, the en banc court was pointing out that the supervisors' behavior was not so pervasive that all of the other female lifeguards were aware of petitioner's predicament.[4] Also, in discussing the fact that Terry's superior, Recreation Superintendent Sandy Dioli-Kumm, was not told by Ewanchew of Terry's and Silverman's harassing behavior, the en banc court was pointing out that Dioli-Kumm had no reason to know of their behavior toward petitioner because during this time

[4] Similarly, the district court found that another female lifeguard, Beverly Barta, had experienced and witnessed offensive conduct on the part of Terry and Silverman, but she did not hear others complain about them. The district court assigned Barta "the highest level of credibility", and it noted that "[h]er lack of awareness of other lifeguards' complaints about Terry and Silverman's conduct casts doubt on the City's ability to be aware of such conduct." Pet. App. 84a.

no such reports had been brought to her attention by anyone at the Marine Safety Section.

The second per se rule advocated by petitioner derives from the district court's finding that the City failed to disseminate its policy against sexual harassment to its Marine Safety Section employees. Pet. App. 83a. According to petitioner, this failure should by itself impute to the City constructive notice of the harassment by Terry and Silverman. The en banc court correctly ruled, however, that "the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment." Pet. App. 17a. Indeed, as the facts of this case demonstrate, when Faragher's co-plaintiff Ewanchew chose to complain in April 1990, she knew enough to direct her letter to the City's Director of Personnel, and that one complaint immediately led to an investigation and disciplinary action against Terry and Silverman. Moreover, although the district court found that Ewanchew "never got a copy of the sexual harassment policy during her tenure with the City" (Pet. App. 83a), the court made no such finding with respect to petitioner. In fact, petitioner declined to register any complaint even after she reviewed the City's revised sexual harassment policy in May 1990.

Petitioner's position is also contrary to all relevant legal authority. The Equal Employment Opportunity Commission's Guidelines suggest that employers adopt and disseminate a policy against sexual harassment, but they do not provide that the failure to do so effectively will create liability. In subsection (f) of 29 C.F.R. § 1604.11, the Guidelines note that an employer "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing

methods to sensitize all concerned." The Guidelines do not say, however, that an employer's failure effectively to disseminate a sexual harassment policy inevitably will lead to a finding that the employer was constructively aware of any harassment that did occur. Indeed, in *Gary,* the D.C. Circuit stated that even a complete failure to adopt a policy against sexual harassment would not automatically give rise to a finding of liability: "[w]e do not suggest that an employer must be found liable under Title VII if it has failed to adopt [an active policy against sexual harassment]; a determination of liability will always require the application of the law of agency to the particular facts of the case." 59 F.3d at 1398.

Finally, focusing on Faragher's complaints to Gordon, petitioner argues for a per se rule that any complaint to anyone in a supervisory role should always constitute notice to the employer. The court of appeals correctly ruled, however, that a low-level supervisor, in whom the petitioner confided as a friend, who had no authority over Terry and Silverman, and who was not involved in the unlawful harassment, should not be treated as the City's agent for purposes of constructive notice.[5] Pet. App. 15a & n.9; Pet. App. 66a & n.16. *See also Kotcher,* 957 F.2d at 63-64 (rejecting plaintiff's argument that another supervisor's knowledge of a supervisor's sexual harassment should constitute notice to employer); *Torres,* 116 F.3d at 637 & n.16 (supervisors whose knowledge can be imputed to the employer include two groups: first, super-

[5] Petitioner incorrectly states (Pet. 27 n.13) that the en banc court found that Gordon was a Lieutenant. In fact, the en banc court noted that Gordon was a Lieutenant and a Training Captain. Pet. App. 3a. The district court also found that Gordon was a Lieutenant and that he later became Training Captain. Pet. App. 71a. Further, there was trial testimony that the position of Training Captain did not rank as high as Captain. Pet. App. 82a. Finally, the district court found that none of these positions, nor even the position of Chief of the Marine Safety Section, qualified as higher management for the City. Pet. App. 71a.

visors charged with a duty to protect the harassed from further harm, and, second, non-management employees charged with substantial responsibility for relaying employee complaints to management). This is consistent with applicable agency principles. Restatement (Second) of Agency § 275 cmt. a ("the principal is affected by the agent's knowledge only if the agent, in failing to impart the knowledge, has failed to act properly within the scope of his authority"). *See also id.* cmt. c. ("the agent must have a duty to reveal the information which he has"). Moreover, the district court's imputation of constructive knowledge as an alternative basis for holding the City liable was internally contradictory, and thus clearly erroneous, given the court's earlier finding that it would not "impute to the City Gordon's actual knowledge of the lifeguards' complaints regarding Terry's and Silverman's conduct . . . ." Pet. App. 84a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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